**BBMB FACTORING BHD**

**v.**

**MARIAM SASIMAN & ANOTHER APPEAL**

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NOS: B-03-78-1998 & W-03-3-2000]
26 MAY 2000

***BANKRUPTCY:*** *Jurisdiction - Discretion to reinstate petition - Petition dismissed or struck out - Creditor's failure to appear at hearing - Bankruptcy Act 1967, s. 92(1) - Bankruptcy Rules 1969, rr. 119 & 120 - Options open to creditor when his petition is struck out*

These two unrelated appeals were heard together before the Court of Appeal because of the common issue raised in the appeals. The issue was whether a bankruptcy court has jurisdiction to reinstate a creditor's petition which has either been dismissed or struck out due to the creditor's failure to appear at the hearing.

**Held:**
**Per Gopal Sri Ram JCA**

**[1]** The jurisdiction under s. 92(1) Bankruptcy Act 1967 applies to any order made by a bankruptcy court. It must therefore *ex necessitae rei* apply to an order dismissing or striking out a creditor's petition.

**[2]** A creditor whose petition has been dismissed or struck out on the grounds of his absence has two courses open to him. He may apply to have the petition reinstated pursuant to s. 92(1) or he may present a fresh petition against the debtor. But if he wishes to adopt the latter, he must, if proposes to rely upon the same act of bankruptcy, obtain leave of court before presenting a new petition.

*[Appeal dismissed with costs.]*

*[**Bahasa Malaysia** Translation Of Headnotes]*

Dua rayuan yang tiada kaitan telah didengar bersama-sama di hadapan Mahkamah Rayuan untuk isu-isu bersama yang dibangkitkan di dalam rayuan-rayuan tersebut. Isunya adalah samada sesebuah mahkamah kebankrapan mempunyai bidangkuasa untuk menghidupkan semula petisyen pemiutang yang telah ditolak atau dibatalkan kerana kegagalan pemiutang untuk hadir pada hari perbicaraan.

**Diputuskan:**
**Oleh Gopal Sri Ram HMR**

**[1]** Bidangkuasa dibawah s. 92(1) Akta Kebankrapan 1967 terpakai kepada sebarang perintah yang dibuat oleh mahkamah kebankrapan. Oleh yang demikian ianya adalah *ex necessitae rei* terpakai kepada satu perintah menolak atau membatal petisyen pemiutang.

**[2]** Seorang pemiutang yang petisyennya telah ditolak atau dibatalkan atas alasan ketidakhadirannya mempunyai dua pilihan. Beliau boleh memohon untuk menghidupkan semula petisyen tersebut selaras dengan s. 92(1) ataupun beliau boleh mengemukakan satu petisyen yang baru terhadap penghutang. Jikalau beliau memilih pilihan kedua, beliau mesti mendapat kebenaran mahkamah sebelum mengemukakan petisyen yang baru, jika beliau ingin bersandar pada perbuatan kebankrapan yang sama.

*[Rayuan ditolak dengan kos.]*

**Case(s) referred to:**
*Commissioners of the Inland Revenue v. Robinson (1998 Unreported Official Transcript)* ***(refd)***
*Fitch v. Official Receiver [1996] 1 WLR 242* ***(refd)***
*Mariam Sasiman v. BBMB Factoring Bhd [1999] 5 CLJ Supp 294* ***(refd)***
*Re a Debtor (No 32/SD/91) [1993] 2 All ER 991* ***(refd)***
*Rohana Ariffin & Anor v. Universiti Sains Malaysia [1988] 1 CLJ 559* ***(refd)***

**Legislation referred to:**
Bankruptcy Act 1967, s. 92(1)
Bankruptcy Rules 1969, rr. 119, 120, 276
Rules of the High Court 1980, O. 32 r. 4

Insolvency Act 1986 [UK], s. 375(1)

*Civil Appeal No: B-03-78-98*
*For the appellant - Vijay Kumar (HM Ong with him); M/s Kumar Jaspal Quah & Aishah*
*For the respondent - RS Ramesh; M/s Malik & Partners*

*Civil Appeal No: W-03-3-2000*
*For the appellant - N Sivanathan; M/s Sivanathan*
*For the respondent - KL Ng; M/s Shui Tai*

*Reported by Yow Ting Fong*

## JUDGMENT

**Gopal Sri Ram JCA:**

There are two appeals before us. They are not connected with each other. But they do raise a common question. It has to do with the jurisdiction and powers of a court in bankruptcy. The question is whether a bankruptcy court has jurisdiction to restore a creditor's petition which has been either dismissed or struck out because of the creditor's failure to appear at the hearing. It is an important question. This is the first time we are being called upon to give our views upon it.

The relevant provision is r. 120 of the Bankruptcy Rules 1969 ("the Rules"). It reads as follows:

> If any creditor neglects to appear on his petition no subsequent petition against the same debtor or debtors or any of them either alone or jointly with any other person shall be presented by the same creditor in respect of the same act of bankruptcy without the leave of the court.

Now, there is nothing in r. 120 to say what is to happen if the creditor does not appear on his petition when it is called on for hearing. This may be contrasted with a case where a debtor fails to appear on his own petition. Such an event is expressly provided for by r. 119 which empowers the court to dismiss the petition. But it is common practice; no doubt following the procedure under the Rules of the High Court 1980; for a court to either dismiss or to strike out a creditor's petition if the creditor or his counsel is absent when the petition is called on for hearing.

Now it has been argued on behalf of the debtor in each of the appeals before us that once a creditor's petition is struck out or dismissed for want of the creditor's presence, then the only recourse open to the creditor is to seek the court's leave to present a fresh petition in accordance with r. 120. They say that there is no power in the court to entertain an application by the creditor to restore or to reinstate the original petition.

Counsel for the creditor in each case, however, argues that that is not the true position. It was submitted that a bankruptcy court has ample power and jurisdiction to reinstate a creditor's petition that has been dismissed for want of presence at the hearing. Counsel suggested two alternative bases for this jurisdiction. First, s. 92(1) of the Bankruptcy Act 1967 ("the Act"). The alternative argument is that based on r. 276 of the Rules.

We will consider the primary argument first. As we said, it is based on s. 92(1) of the Act. That section reads:

> 92(1) The court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Although this provision appears under the heading "appeals" in the Act, it does not, strictly speaking, deal with appellate procedure. That is because of the true nature of an appeal which is a continuation of the original proceeding by way of re-hearing (*Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1988] 1 CLJ 559). In the context of the justice system, it is a process by which the decision of one court is reviewed for correctness by a higher court in the judicial hierarchy. An appeal does not involve the review by a court of its own decision. Section 92(1) on the other hand enables a court to review its own decision.

Counsel in both appeals informed us that they were unable to find any authority that would assist us in construing s. 92(1). However, our own limited researches have revealed three cases upon the similar provision in the equipollent United Kingdom statute. That provision is s. 375(1) of the Insolvency Act 1986. It is in these terms:

> Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction.

The UK provision was first considered in *Re a Debtor (No. 32/SD/91)* [1993] 2 All ER 991 in the context of an application to review an order dismissing an application to set aside a statutory demand. Millett J, (now Lord Millett) held that he had jurisdiction to review the earlier order. He said:

> It follows, in my judgment, that there is jurisdiction in the court to review and rescind or vary an order dismissing an application to set aside a statutory demand, and the contrary was not contended before me. As a matter of discretion I have no doubt that the jurisdiction ought to be rarely exercised, since the effect of doing so would be to allow what would amount to a renewed application to set aside a statutory demand after the period limited for making the application.

The second case is *Fitch v. Official Receiver* [1996] 1 WLR 242, where the English Court of Appeal recognised the discretionary nature of the jurisdiction of the court under s. 375(1). Millett LJ, who delivered the judgment of the court said:

> The section replaced sections in identical terms in earlier Bankruptcy Acts: see section 104(1) of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) and section 108(1) of the Bankruptcy Act 1914. The jurisdiction is unique to insolvency, (having recently been extended from bankruptcy to company winding up), in that it allows the court to review and rescind or vary an order made by a court of co-ordinate jurisdiction. It applies to any order made in the exercise of the

bankruptcy jurisdiction. It is available to rescind a bankruptcy order as it was formerly available to rescind a receiving order. The court's power to review and if thought fit rescind a bankruptcy order is, in theory at least, virtually unlimited. It may be contrasted with the power of the court to annul a bankruptcy order under section 282(l) of the Insolvency Act 1986, which replaced section 29 of the Bankruptcy Act 1914. This is limited to two situations: (i) where it appears to the court that, on any grounds existing at the time the order was made, the order ought not to have been made; and (ii) where, since the making of the order, the bankruptcy debts and the expenses of the bankruptcy have been duly paid. Except in this second case, the court's power to annul the bankruptcy order must be based on grounds existing at the time of when the bankruptcy order was made.

Similarly of course, an appellate court can quash a bankruptcy order only if it is satisfied that, on the evidence which was before the court which made the order or on new evidence which is admitted in accordance with the rule in *Ladd v. Marshall* [1954] 1 WLR 1489, the order should not have been made. An application under section 375(1) is essentially different. It must be based on a change in circumstances since the order was made or, more rarely, on the discovery of further evidence which could not be adduced on appeal.

In a later passage at p. 248G of the report, Millett LJ again emphasised that "the statutory discretion is in terms unlimited" but went on to say (at p. 249A) that "the discretion is still to be exercised with caution and only in exceptional circumstances".

The third is the unreported case of *Commissioners of the Inland Revenue v. Robinson* (1998) (Unreported Official Transcript) where Whiteman Q.C., sitting as a deputy judge of the Chancery Division on an appeal from the deputy registrar who had rescinded a bankruptcy order made against the debtor. The learned deputy judge applied the decision in *Fitch v. Official Receiver (ibid)*. However, on the facts before him he held that the bankruptcy order had been wrongly rescinded.

Now, it is true that both *Fitch v. Official Receiver (supra)* and *Commissioners of the Inland Revenue v. Robinson (ibid)* were cases that concerned applications to annul adjudication orders made against a debtor. But it is noteworthy that *Re a Debtor (No. 32/SD/91) (supra)* was not. It is therefore apparent that the jurisdiction under the equipollent UK statute has been applied in at least one case which did not concern the annulment of an adjudication order.

There is certainly nothing in the language of s. 92(1) that points to an intention on the part of parliament to confer a narrow jurisdiction upon a bankruptcy court. On the other hand, there is every indication that parliament intended to confer an untrammelled discretion upon the court.

Further, given the words "any order" appearing therein, we are satisfied that the jurisdiction under s. 92(1) applies to any order made by a bankruptcy court. It must therefore *ex necessitae rei* apply to an order dismissing or striking out a creditor's petition. Of course, when exercising its discretionary jurisdiction the court must have regard to all the circumstances of the case, including any explanation proffered by the creditor or his counsel for his absence when the petition was called on for hearing. That is quite another matter. The exercise of that discretion, like all discretions, is reviewable on appeal by this court upon well-settled principles.

It follows from what we have said thus far that a creditor whose petition has been dismissed or struck out on the grounds of his absence has two courses open to him. He may apply under s. 92(1) to have his petition reinstated for hearing. If he fails in his application, or if he does not wish to have his former petition reinstated, then, in either case, he may present a fresh petition against the debtor. But if he wishes to adopt the latter course, he must, if proposes to rely upon the same act of bankruptcy, obtain leave of the court before presenting a new petition.

In the light of our views thus far expressed, it makes it unnecessary for us to consider the merits of the alternative submission advanced by counsel based on r. 276. All that remains is to apply the principles we have thus far culled from the authorities to the fact pattern in each of the appeals before us.

***Appeal No B-03-78-98***

In this case, the senior assistant registrar dismissed the appellant creditor's petition on 29 May 1997 by reason of the failure of the appellant's solicitor to be present when the petition was called on. From the evidence lodged in court by the appellant's solicitor and completely accepted by the respondent, it is clear that the absence in question was the result of a misunderstanding about the case having been administratively adjourned by the registry on the morning of the hearing. In fact the appellant's solicitor attended court on the date of hearing but upon being informed that her papers were not in order and that the petition had for that reason been postponed, she left. However, that information turned out to be incorrect as the petition was called on and dismissed for want of presence.

Later, the senior assistant registrar entertained and allowed an application by the appellant to have the petition restored to file. The respondent debtor appealed to the judge in chambers who allowed the appeal. The primary ground upon which the learned judge relied was that the only course open

to the appellant was to seek the leave of the court to present a fresh petition. He held that the senior assistant registrar had no jurisdiction to permit a reinstatement of the petition that had already been dismissed.

For our part, based on the views expressed earlier in this judgment, we are unable to agree with the learned judge. In our opinion, the registrar had ample jurisdiction to order reinstatement. What remains is the question whether the registrar was correct in exercising discretion in the appellant's favour. On the material contained in the affidavits, that question must, we think, be answered in the affirmative. Indeed there is no submission made to us that there had been an error in the way in which discretion had been exercised in this case.

For the reasons already given this appeal is allowed. The orders of the judge are set aside. The order of the senior assistant registrar is restored. The debtor must pay the costs of the appeal and of all the proceedings in the court below save and except the costs of the hearing before the registrar at which the order for reinstatement was made. Those costs must be borne by the appellant. The deposit in court is to be refunded to the appellant. The appellant's petition is restored to file and the High Court shall forthwith fix a date for its disposal.

***Appeal No W-03-2000***

In this case, the respondent had taken out a creditor's petition against the appellant. It was returnable on 11 November 1998. It had not been served by that date. When it was called on for hearing, the respondent was absent. The registrar struck out the petition for want of the respondent's presence. Later, the respondent applied to reinstate the petition. Its application came on for hearing on 6 April 1999. The appellant did not object to the application. So, the registrar made an order reinstating the petition. On 10 June 1999 the appellant applied to strike out the petition. That application was heard and dismissed. The appellant then appealed to the judge in chambers. He relied on the judgment of the Shah Alam High Court in the earlier appeal. It had, by then, been reported. See, *Mariam bt. Sasiman v. BBMB Factoring Berhad* [1999] 5 CLJ Supp 294. The learned judge who heard the appeal declined to follow it. The judge concluded that this was a case in which the Rules were silent upon the power to reinstate a creditor's petition. He accordingly applied RHC O. 32 r. 4. He did so in reliance of r. 276 of the Rules. That Rule says that if there is any matter in respect of which the Rules make no provision, then the RHC 1980 may be prayed in aid.

The reasons for our conclusion in the other appeal make it unnecessary for us to express any opinion on the correctness of the learned judge's view on the application of r. 276. This is a case in which the registrar had ample jurisdiction under s. 92(1) of the Act to make an order of reinstatement. The learned judge should have so held. Further, there is no suggestion that there had been any error in the way in which discretion had been exercised in the matter. Accordingly, for reasons different from those expressed by the learned judge, we would dismiss this appeal. The orders made by in the court below are affirmed. The appellant must bear the costs in this court. The deposit is to be paid out to the respondent to account of its taxed costs.